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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

JAMES FRANCIS,

Petitioner,

AGAINST

FREDERIC A. CRAFTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Summary Statement of the Matter Involved.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James Francis, referred to herein as the Petitioner, respectfully prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the First Circuit, entered April 22, 1953, which affirmed a judgment of the United States District Court for the District of Massachusetts.

Summary Statement of the Matter Involved.

On June 23, 1952, James Francis filed a Bill of Complaint (R. 1) seeking damages under the Third Civil Rights Act, 8 U. S. C. #43, against the respondent, Frederic A. Crafts,

Special Justice of the Second District Court of Eastern Middlesex, Commonwealth of Massachusetts, and other officials of said Commonwealth. The Bill alleged that the respondent, a judicial officer of the Commonwealth of Massachusetts, acting under color and purported authority of the laws of Massachusetts, subjected the petitioner to the deprivation of rights secured to him by and under the Constitution and laws of the United States, to wit: that the respondent, on March 19, 1940, committed him to the Department of Defective Delinquents at the Bridgewater State Farm, a penal institution under the jurisdiction of the Department of Correction for the Commonwealth of Massachusetts (R. 25), without affording him an opportunity to defend; without a fair and impartial hearing; and in a completely ex parte proceeding, at which neither the petitioner nor anyone in his behalf were present or represented (R. 4); thereby depriving the petitioner of his right to liberty without due process of law (R. 8) as guaranteed to him under the Constitution and laws of the United States (R. 8); and that the respondent purported to act under color of and in accordance with the authority of the laws of Massachusetts (R. 8).

The petitioner further alleged that he was released from custody on March 27, 1952 by virtue of a Writ of Habeas Corpus from the Massachusetts Superior Court for the County of Suffolk (R. 8).

The respondent moved to dismiss (R. 9) and for summary judgment (R. 10), submitting an affidavit (R. 11) with exhibits annexed (R. 14, 15, 18, and 20). In his affidavit the respondent asserted that he was a Special Justice of the Second District Court of Eastern Middlesex; that said Court was a court of general jurisdiction and that on March 19, 1940 he was sitting in his judicial capacity as both Special and Acting Justice of said Court. The affidavit further stated that on March 19, 1940 a report was pre-

sented to him by the Superintendent of the Walter E. Fernald School, a school for the feebleminded within the jurisdiction of said Court; that the petitioner was an inmate therein and was not a proper subject for retention therein, and requesting the transfer of the petitioner to the Department of Defective Delinquents (R. 12, 14); that notice was given to the Massachusetts Department of Mental Health which caused a written report to be made to him (R. 12, 15); that he made inquiry into the facts and entered an order for removal of the petitioner to a department for defective delinquents under and in accordance with Massachusetts General Laws, Chapter 123, Section 116 (R. 12, 18); and that the respondent was informed and believed that the petitioner was a voluntary inmate of the Fernald School, and that the mother of the petitioner, the petitioner being then a minor, was present at the Fernald School and assented to the removal (R. 12).

Based on this affidavit, the respondent advanced as grounds for his motions that he merely assented to the removal of the plaintiff from one institution to another (R. 10); that the Statute of Limitations had run (R. 10); and that he was immune, being a judge of a court of general jurisdiction (R. 10).

Thereupon the petitioner moved for summary judgment (R. 21) on the grounds that there was no issue of material fact to be tried and that he was entitled to summary judgment as a matter of law, despite the fact that it appeared from all the papers on file that the petitioner was committed without notice, hearing, or opportunity to defend.

The District Court in its decision (R. 22) ruled that the facts, as they appeared in the pleadings and affidavits, were not in dispute and that the case was properly one for summary judgment (R. 23). The District Court further made the following conclusions of fact and rulings of law based

on these material facts, namely: that the respondent purported to act under authority of the laws of Massachusetts (R. 25); that, as a result of the order made by the respondent, the petitioner ceased to be a voluntary inmate of a school for the feebleminded under the jurisdiction of the Department of Mental Health and became an involuntary inmate of a penal institution under the Department of Correction (R. 25); that the order required a judicial determination that the plaintiff was delinquent, i.e. a wrongdoer, in addition to being mentally defective (R. 26); that the respondent acted without giving the petitioner notice or an opportunity to be heard (R. 25); that such proceedings were lacking in the essential elements of due process and were a violation of the petitioner's rights under the Fourteenth Amendment (R. 25); and that the respondent thereby deprived the petitioner of these rights (R. 25, 26). However, the Court went on to rule that the respondent was immune from liability, being a judge, (R. 30).

From the Final Judgment of the District Court (R. 22) dismissing the Bill of Complaint the petitioner appealed and the Circuit Court affirmed (R. 44), stating in its Opinion (R. 37) that state judicial officers are immune from the provisions of the Third Civil Rights Act, 8 U. S. C. #43.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts (R. 22) is reported in 108 F. Supp. 884. The opinion of the United States Court of Appeals for the First Circuit (R. 37) is reported in 203 F. (2d) 809.

Jurisdiction.

This is a petition for Writ of Certiorari to review a judgment of the United States Court of Appeals for the First Circuit (R. 44) entered April 22, 1953 affirming the

Final Judgment of United States District Court for the District of Massachusetts (R. 22) entered December 15, 1952 dismissing petitioner's Bill of Complaint in an action for deprivation of the petitioner's civil rights under the Third Civil Rights Act, 8 U. S. C. #43, wherefore the District Court had original jurisdiction (28 U. S. C. #1343 (3); the Circuit Court had appellate jurisdiction (28 U. S. C. 1291); and this Court has jurisdiction to review by Writ of Certiorari by virtue of 28 U. S. C. 1254 (1).

Question Presented.

The question presented is whether state judicial officers are amenable to the provisions of the Third Civil Rights Act, 8 U. S. C. #43.

Reasons for Granting the Writ.

I. *The decision of the Circuit Court conflicts with a decision of the Third Circuit.*

The Third Circuit in the case of *Picking* v. *Penn. R.R. Co.*, 151 F. (2d) 240, *rehearing denied* 152 F. (2d) 753, expressly held that state judicial officers are liable under the provisions of the Third Civil Rights Act *to the extent indicated by that statute.*

II. *The decision of the Circuit Court was decided in a way probably in conflict with the applicable decisions of this Court.*

As more fully pointed out in the brief annexed hereto, this Court has affirmatively held that state judges are amenable to the provisions of the federal laws as no state can confer authority on its officers to violate federal laws; that the mere fact the act is by the judicial branch of the state government does not confer immunity; and that this Court has declared that a state officer is liable in such case

where abuse or misuse of state conferred authority violates a federal law.

III. *The precise question presented by this case is an important question of federal law, which has not been ultimately and conclusively settled, but should be so settled by this Court.*

Among other things this case involves solution of the important and vexing problem of the rights of individuals as against the powers and privileges of state judges.

IV. *The Circuit Court has sanctioned so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

The Circuit Court has sanctioned the act of the District Court in going beyond the legitimate limits of statutory construction and has become party to unwarranted judicial legislation. The Circuit Court, as well as the District Court, has failed to apply the rules of statutory construction as laid down by this Court and has failed to follow this Court's decided cases. In addition thereto, the Circuit Court failed to treat certain questions raised by the petitioner which were material to the issue before said Court, as will be shown in brief annexed hereto.

Wherefore, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the First Circuit.

Boston, Massachusetts, July 16, 1953.

Respectfully submitted,

ISADORE H. Y. MUCHNICK,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

JAMES FRANCIS,

Petitioner,

AGAINST

FREDERIC A. CRAFTS,

Respondent.

PETITIONER'S BRIEF.

I.

The decision of the Circuit Court conflicts with a decision of the Third Circuit.

In *Picking* v. *Penn. R.R. Co.*, 151 F. (2d) 240, *rehearing denied* 152 F. (2d) 753, the Third Circuit held that, by enacting the Civil Rights Act, Congress intended to, and did in fact, abrogate the privilege of state judicial officers *to the extent indicated by the statute.* The ratio decidendi of this case was that where a state judicial officer *deprives* one of a *federal right* by *purporting* to act or by acting under *color of* state law, he is liable under the statute. Thus, reasoned the Court, he is liable where he *misuses, abuses* or *exceeds* his legitimate authority as limited by the federal law.

This doctrine is in accord with the present status of the law. The gist of the action is whether, under the established rules of the United States Constitution and laws guaranteeing certain fundamental safeguards to every individual, the defendant has misused, abused, or exceeded his *legitimate* authority conferred on him by the state, or has wrongfully invoked that authority, thereby depriving an individual of a federal right.

In both the case at bar and the *Picking* case, the complaining party was deprived irrevocably of rights secured by the federal law. In both cases they were denied a trial or any kind of hearing. In the case at bar the petitioner was deprived of all his rights. He had no notice that either he or his rights were in danger, no opportunity to defend, and was unable to offer anything in his behalf to aid the respondent in his "inquiry into the facts".

The petitioner fails to see how the *Picking* case is overruled by analogy by the case of *Tenney* v. *Brandhove,* 341 U. S. 367 (R. 43). Not only do the material facts differ to a great degree, but in the *Tenney* case this Court expressly stated that the decision was predicated on the ground that the defendants, state legislators, acted *within* their legitimate authority. The Court recognized that there is liability in a case where a state legislator *exceeded* his authority. The petitioner submits, as will more fully appear below, that this decision is clearly distinguishable from the situation presented by the facts of the case at bar and the *Picking* case and that in fact the *Tenney* case is authority for the petitioner's contentions.

II.

The decision of the Circuit Court was decided in a way probably in conflict with the applicable decisions of this Court.

In the leading case of *Ex Parte Young,* 209 U. S. 123,

this Court enunciated the proposition that state officers could be reached *in their person* by the federal law, and the fact they were acting under state law did not bar the action. The general principle enunciated in this case has been affirmed by a long line of decisions, the most notable and recent of which is the decision in *Shelley* v. *Kraemer,* 334 U. S. 1, wherein it was made clear that state action was subject to the provisions of the Fourteenth Amendment and the mere fact that the act was that of the judicial branch of the government did not make the actions immune.

The principles enunciated above apply in equal force, if not more so, in cases arising under the Civil Rights Act. It should be noted at the outset that, prior to the enactment of this section, this Court held that a statute directed against the actions of private persons, without reference to their acting in their official capacity under the laws of the state, was not justified by any clause in the Fourteenth Amendment.

United States v. *Williams,* 341 U. S. 70.

It is therefore incumbent on the plaintiff to show that the defendant was acting under authority or pretense of authority conferred on him by state law. This can mean solely that the Civil Rights Act makes liable only those people who *as state officials misuse, abuse,* or *exceed* their *legitimate* authority as limited by federal law. This problem was settled by the case of *Screws* v. *United States,* 325 U. S. 91. It was therein held that under *color of law* meant under *pretense of law;* and though this Court has been divided on this case and its recent application, the petitioner submits that there can be no dispute in the case at bar.

The gist of the petitioner's contention is that the decision of the Circuit Court seems to say that under the doctrine of the *Tenney* case legislators are immune and therefore

judges are immune. If this be the case, then likewise should the executive be held immune. The petitioner cannot conceive of a statute under which the only persons who can possibly come within its provisions are to be held immune by *judicial* legislation.

In further support of his contention, which the petitioner intends to amplify if this Petition is granted, the petitioner submits that the decision in *Ex Parte Virginia,* 100 U. S. 339, is controlling in the case at bar. It was therein decided that a state judge was criminally liable for the violation of a federal statute in the selection of juries. The Court stated that his act was not judicial as the selection of juries was a ministerial act, but even if the act was judicial he would be liable as he exceeded his authority and went beyond the *spirit* of the state statute. Is not this the case here? Are the giving of notice, opportunity to defend, and a fair hearing *judicial* acts as such? And it should be noted that even though the respondent complied with the express requirements of the Massachusetts statute he did not comply with its *spirit.* This is borne out by the decision in *Petition of O'Leary,* 325 Mass. 179, wherein the Massachusetts Supreme Judicial Court held that a companion statute was not unconstitutional for not expressly requiring notice, *as it impliedly required notice* in conformance with the fundamental rules of due process. The Superior Court of Massachusetts applied this decision to the facts of the case at bar when it released the petitioner on a writ of habeas corpus, and it held that the statute under which the defendant acted required notice and hearing.

> *Francis* v. *Dolan, Massachusetts Superior Court for Suffolk County,* No. 456845.

Therefore, even if the respondent's act is considered judicial, it still falls within the doctrine of *Ex Parte Virginia,* supra.

III.

The precise question presented by this case is an important question of Federal law which has not been ultimately and conclusively settled, but should be so settled, by this Court.

This Court has not yet decided to what extent, if any, and under what circumstances a state judicial officer is liable under the provisions of the Third Civil Rights Act.

This is an important question of federal law as it involves, among other things, the relation between state and federal government, the correct interpretation of a most important federal statute, and the relation between individual rights and the powers and privileges of state judges.

The field of Civil Liberties has always been an important field. It is even more important when it involves other constitutional questions. The decision of the Circuit Court would seem to place immunity for a state judicial officer on a higher plane than due process and other fundamental rights guaranteed to the individual by our Constitution. Thus this case presents to this Court the question of whether one unlawfully imprisoned after being deprived of his most fundamental rights has any redress against judges or other officials who deprived him of those rights. In deciding this question this Court must come to grips with the vexing problem of the respective spheres and limitations of federal and state power. Thus the Court is faced with a question bristling with constitutional issues of the gravest nature.

IV.

The Circuit Court has sanctioned so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Both the District Court and the Circuit Court failed to follow this Court's long standing, well established rule of

statutory construction. The Circuit Court, without justification, ratified the view of the District Court that the statute in question was not intended to obliterate the common law principle of immunity (R. 27, 28, 40, 41, 42, 43, & 44.) Such decision was clearly improper and in violation of the principle enunciated by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 97 L. Ed. 899, where this Court outlined the proper approach in the construction of statutes. With all due respect to the learned Chancellor, we are not to be concerned, as was the District Court, with what Chancellor Kent would say (R. 28);— we are concerned with what Congress *did* say in enacting the Civil Rights Act.

An exact and a proper formulation of the issue in the case at bar illustrates clearly that this case is an instance where the exceptions so carefully noted in the *Tenney* case apply. The extremely narrow construction by the Circuit Court of the Civil Rights Act runs contrary, not only to the spirit of this Act and of the *Tenney* case, but also runs contrary to the well established principles of statutory construction laid down by this Court.

A glance at the decision in *Unexcelled Chemical Corp.* v. *United States,* 97 L. Ed. 486 at 489 and 490 clearly shows the proper judicial method of statutory construction:— "If this cause of action is not covered by that language, apparently none other is. It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here."

Merely because a judge may not favor the progressive legislation by which judicial immunity is eliminated does not give that judge, whether he be a judge of the District Court or Circuit Court, the right to use any yardstick of statutory construction other than the yardstick sanctioned by this Court. Nor does it give such judge the right to repeal, by judicial legislation, the properly enacted statutes of the Congress of the United States. Congress has the right, without judicial interference or repealer, to enact legislation which it, Congress, feels will express the social purposes and aims of the nation, provided no constitutional provisions are violated. Here is a clear case of proper Congressional action and improper judicial repealer. The language in *Dalehite* v. *U. S.*, 97 L. Ed. 929, and *Central Bank* v. *U. S.*, 97 L. Ed. 872, very strongly supports the petitioner's contention in this regard. As one reads the clear language of the *Dalehite* and *Central Bank* cases in the light of the facts of the case at bar, it is clear that the Circuit Court was wrong in its interpretation of the statute.

It is respectfully submitted that Congress by enacting the Civil Rights Act intended to and did attach greater importance to the rights of the individual to his constitutional guarantees than to the judicial privilege of immunity. It is further respectfully submitted that the District Court and the Circuit Court, as hereinabove stated and as can be furher set forth in greater detail if this Petition is granted, failed to act properly in protecting the petitioner's rights under said Act.

Wherefore, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the First Circuit.

Respectfully Submitted,

Isadore H. Y. Muchnick,

Attorney for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 191.

JAMES FRANCIS, *Petitioner,*

v.

FREDERIC A. CRAFTS, *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This is a petition seeking to review a decision of the United States Court of Appeals for the First Circuit (R. 35) affirming a decision of the Massachusetts District Court (R. 22) to the effect, in substance, that the respondent is immune from civil liability under the provisions of the Civil Rights Act, 8 U.S.C. 43, for action taken in the course of performing his official duties as judge of a Massachusetts Court of general jurisdiction.

Facts.

The facts appear in the affidavit of the respondent and the documents attached thereto (R. 11 to 20, incl.) and are not refuted.

While the respondent was sitting as Special and Acting Justice of a Massachusetts Court on March 19, 1940, the Superintendent of one State institution requested the transfer of the petitioner to another State institution because of a behavior problem under the provisions of Massachusetts Acts of 1911, chapter 595, section 4 (now included in Massachusetts General Laws, chapter 123, section 116) (R. 11, 12, 14). The petitioner was examined by two physicians, who reported to the respondent that he was not suffering from mental disease and did not recommend commitment to a reformatory, jail or prison, but found that he was "a defective delinquent and will need institutional care on the basis of delinquency" (R. 17). The petitioner was then a minor and his mother was present at the institution on March 19, 1940, and was notified of the request for his removal and assented to it (R. 12). The petitioner was an inmate there as the result of a voluntary admission (R. 12).

The respondent entered an order under a Massachusetts statute on March 19, 1940, for the removal of the petitioner from one institution to another in order that he might receive a more suitable type of care (R. 13, 18).

Statute Involved.

The statute in effect on March 19, 1940, under which the request and order for removal were made, is Massachusetts Acts of 1911, chapter 595, section 4, reading as follows:

> "If an inmate of a school for the feeble minded persistently violates the regulations of the school, or conducts himself so indecently or immorally, or so grossly misbehaves as to render himself an unfit subject for retention therein, the officer in charge shall make a report thereof to one of the judges mentioned in section fifty. The judge shall make inquiry into the facts

and, if satisfied that such inmate is not a fit subject for retention in the school, shall order his removal to a department for defective delinquents, according to his age and sex as hereinafter provided."

Point I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS IN THIS CASE IS IN ACCORD WITH THE DECISION OF THIS COURT AND OF OTHER COURTS.

The specific contention of the petitioner that judges are not immune from suit under the Civil Rights Act was decided adversely to his contention by this Court in *Tenney* v. *Brandhove,* 341 U.S. 367. In that case a petition for a rehearing was denied in 342 U.S. 843, and there would seem to be no sufficient reason for another hearing by this Court of the same issue.

See also

Alzua v. *Johnson,* 231 U.S. 106.
Bradley v. *Fisher,* 13 Wall. 335, 347.

The statute invoked by the plaintiff in 8 U.S.C. 43 was originally enacted in 1871 and many other cases decided since that date have consistently sustained the rule as to the exemption of a judge from civil liability on account of his judicial acts.

Spruill v. *O'Toole,* 74 F. (2d) 559, at 560 (C.A. D.C. 1934).
Fletcher v. *Wheat,* 100 F. (2d) 432 (C.A. D.C. 1938).
Booth v. *Fletcher,* 101 F. (2d) 676, at 680 (C.A. D.C. 1938).
Brictson v. *Woodrough,* 164 F. (2d) 107, at 109 (C.C.A. 8th Cir. 1947).

Connor v. *Real Title Corporation,* 165 F. (2d) 291, at 294 (C.C.A. 4th Cir. 1947).

Bottone v. *Lindsley,* 170 F. (2d) 705 (C.A. 10th Cir. 1948).

Fletcher v. *Bryan,* 175 F. (2d) 716, at 718 (C.A. 4th Cir. 1949).

Gregoire v. *Biddle,* 177 F. (2d) 579, at 580 (C.A. 2d Cir. 1949).

Papagianakis v. *The S.S. Samos,* 186 F. (2d) 257, at 260 (C.A. 4th Cir. 1950).

Allard v. *Estes,* 292 Mass. 187, 189.

Cobb v. *Malden,* 202 F. (2d) 701 (C.A. 1st Cir. 1953).

Point II.

THE DECISION OF THE THIRD CIRCUIT RELIED UPON BY THE PETITIONER IS NOT CONTROLLING ON THE ISSUE RAISED.

The petitioner relies upon the case of *Picking* v. *Pennsylvania Railroad Co.,* 151 F. (2d) 240 (C.C.A. 3d Cir. 1945). That case was decided before the decision of this Court in *Tenney* v. *Brandhove,* 341 U.S. 367, and is also distinguishable on its facts.

Alzua v. *Johnson,* 231 U.S. 106, 111.
Record, p. 40, and pp. 26-29, incl.

Point III.

UPON THE UNDISPUTED FACTS THE PETITIONER WAS NOT DEPRIVED OF ANY RIGHTS BY THE RESPONDENT.

As a voluntary inmate of a school for feeble-minded the then minor petitioner was transferred to another State institution with his mother's consent (R. 12) and the order of

the respondent was merely for his removal to insure suitable care (R. 13, 18).

The petitioner was not charged with, convicted of or sentenced for any criminal offense in connection with which he was entitled to notice or a trial and presumably could have been released from either State institution at any time with the approval of his parent.

There is no basis of fact in the record for any application of the rule contended for by the petitioner and the facts are fully set forth in the opinion of the Court of Appeals as a basis for its decision (R. 36, 37).

Conclusion.

The opinion of the Court of Appeals is sound and able and should be sustained.

It is accordingly submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Cambridge, Massachusetts,
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 191

JAMES FRANCIS,

Petitioner,

AGAINST

FREDERIC A. CRAFTS,

Respondent.

REPLY BRIEF FOR PETITIONER.

I.

As to the Facts as Set Forth by the Respondent.

The Bill of Complaint asserts that the Petitioner was committed to a penal institution without notice and hearing (R. 4). The allegations in the Bill of Complaint are before the Court on motions to dismiss and for summary judgment.

Sprague v. *Vogt*, 150 F. (2d) 265

The District Court found as conclusions of fact and findings of local law that the petitioner was committed to a penal institution without notice, hearing or opportunity to defend; *that a judicial determination was required and that there was no such determination;* and that the proceedings violated the petitioner's rights under the Constitution and laws of the United States. (R. 25 paragraph 2 through R. 26 paragraph 1).

The decisions of the Trial Court on questions of local law and fact are binding on the Appellate Court unless plainly wrong.

Russell v. *Turner,* 148 F. (2d) 562

The Massachusetts statutes and decisions are in accord.

Massachusetts General Laws (Ter. Ed.) Chapter 123, *Sections* 21, 45, 46, 47, and 113-122; *Chapter* 127, *Sections* 11A, 117, 128, 130, 132 and 134.

Petition of Commissioner of Correction, 324 Mass. 535

The application and commitment papers referred to the petitioner as *the defendant,* these papers were obtained from the *Department of Correction* and were directed to officers authorized to serve *criminal process* (R. 14-18).

Petition of O'Leary, 325 Mass. 179.

The respondent's assertion that the petitioner's mother was present and assented is based on *information and belief* (R. 12). It neither appears on the record of the commitment contained in the respondent's exhibits nor could the respondent affirmatively state it as a fact in his affidavit.

An affidavit based on information and belief is inadmissable.

Jameson v. *Jameson,* 176 F. (2d) 58

Apparently the Circuit Court was more impressed by the respondent's characterizations of what he did than was the District Court. The Circuit Court's unwarranted disregard of the District Court's findings is another ground which the petitioner advances for granting the Writ. On the facts the petitioner contends that there is no immunity

in the case at bar and that judges are amenable to the provisions of the Civil Rights Act.

II.

As to the Respondent's contention that applicable cases of this Court are in accord.

The petitioner in his brief has asserted that the applicable decisions of this Court are probably in conflict with the decision of the Court of Appeals. It is submitted that the respondent has not met this contention.

The case of *Tenney* v. *Brandhove,* 341 U.S. 367 does not preclude the petitioner but supports his contention. The petitioner will expound this point more fully if and when Certiorari is granted but for the purposes of his present contentions submits;

a.) The ratio decidendi behind the Tenney decision was that a state legislator will be immune if he acts within his legitimate authority; *but not if he exceeds it.* Thus, a state legislator who deprives a person of a Federal Right in pursuance of a legitimate exercise of the legislative investigatory power is immune, *but a legislator who deprives one of his Federal Rights by exceeding his legitimate authority will be liable.*

The petitioner submits that this respondent was not engaged in a "legitimate" exercise of his judicial power but was acting "illegitimately" in that he did not invoke the necessary constitutional prerequisites in the exercise of his judicial power which were necessary to confer lawful jurisdiction upon him to act; but that he acted arbitrarily, summarily, and without regard to these requirements; thereby acting in *direct violation* of both federal and state law. In other words the respondent was engaged in a wrongful

exercise of power, an abuse of authority; — not a lawful exercise of power.*

b.) The Tenney Case involved State Legislators, not judges. This distinction is important in that this Court has already ruled on judicial immunity under a federal statute. See: *Ex Parte Virginia,* 100 U.S. 339. See also: *Shelley* v. *Kraemer,* 334 U.S. 1.

c.) The Tenney Case involved a peculiar factual situation and was decided on the basis of those facts and those facts alone. The facts in the case at bar are clearly distinguishable and present a situation which the Tenney Case recognized as one imposing liability.

d.) The Tenney Case is, in reality, the converse of *Picking* v. *Penn R.R. Co.,* 151 F. (2d) 240, 152 F. (2d) 753, on which petitioner relies. In Picking it was held that state judges are liable *to the extent indicated by the statute;* i.e. *to the extent they misuse, abuse, or exceed their legitimate authority.* Tenney on the other hand held that state legis-

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*Attention is directed to the opinion of the District Court in this regard: *Record, page 26, line 1.*

"Before taking action under #116, the judge was required not only to inquire into his mental state, but also to find that he had engaged in such wrongful conduct as to make him no longer a proper subject of a school for the feebleminded. A judicial determination was required that in addition to being mentally defective he was also a delinquent, a wrongdoer. The order for committal bears out what was done."

Record, page 25, line 15.

"This was done without notice to Francis and without giving him any opportunity to be heard. Such a proceeding lacked the essential elements of due process . . . (citations) . . . Such a deprivation of personal liberty without due process of law was a violation of the rights of Francis under the Fourteenth Amendment."

lators are immune under this statute *to the extent they act within their legitimate authority.*

Thus it can be seen that petitioner's contention is based on what the Tenney case implied; that there is liability for an illegitimate exercise of power.

The other cases cited by the respondent do not contradict the petitioner's contentions in this regard. Neither *Alzua* v. *Johnson,* 231 U.S. 106 nor *Bradley* v. *Fisher,* 13 Wall 335 involved the Civil Rights Act or a state judge violating a federal statute.

Nor do any of the other cases cited by the respondent contradict this rule.

III.

As to whether the decision of the Third Circuit is controlling.

Picking v. *Penn R.R. Co.,* supra, is an affirmative holding by another Circuit Court to the effect that state judicial officers are amenable to the provisions of the Civil Rights Acts. *Tenney* v. *Brandhove, supra,* rather than overruling this case, impliedly affirms its holding.

IV.

As to whether the Petitioner was deprived of his Federal Rights.

This is amply illustrated in the decision of the District Court (R. 25, 26).

CONCLUSION.

The respondent has failed to show why Certiorari should not be granted. This case presents more than one ground for granting the Writ. There are conflicting Circuit Court

opinions; the Circuit Court's decision conflicts with applicable decisions of this Court; there are important questions of federal law which should be settled by this Court; and the Circuit Court has departed and sanctioned the District Court's departure from the accepted and usual course of Judicial proceedings.

It is accordingly submitted that the Petition for Writ of Certiorari in this case be granted.

Respectfully Submitted,

Isadore H. Y. Muchnick,
Attorney for Petitioner.

ERRATA.

The original brief of the petitioner should be amended as follows:

1. Page 3, paragraph 3, line 4 . . . .

   Delete the word "despite" and substitute the words "because of".

2. Page 8, ...

   Strike the citation:

   "United States v. *Williams,* 341 U.S. 70"

   and substitute:

   "United States v. *Harris,* 106 U.S. 629"